IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION

NOTICE OF MOTION NO.91 OF 2005
IN
SUIT NO.12 OF 1991
IN
PETITION NO.647 OF 1990

Prithviraj A. Patel ....Plaintiff
V/s.
Meena Vasant Patel ....Defendant

Mr.R.C. Shah for the Plaintiff.
Mr.Deepen Merchant i/b M/s.Bilawala & Co. for the Defendant.

CORAM : S.J. VAZIFDAR, J.
DATED : 15TH FEBRUARY, 2006.

P.C. :

1. The Notice of Motion has been filed by the Defendant/original caveator for an order directing the Plaintiff/original Petitioner to proceed with the hearing of the above suit first at this stage and thereafter to proceed with suit No.48 of 1990. The Defendant has also sought an order directing the Plaintiff to file his affidavit of evidence in examination-in-chief within two weeks. Lastly the Defendant has sought an appointment of a Commissioner for recording the evidence of the Plaintiff on a day to day basis.

2. The parties had agreed that the evidence of all the witnesses of both the parties be recorded by a Commissioner. They had agreed that Mr.Girish Desai, an advocate of this Court be appointed as the Commissioner for this purpose.

3. By an order dated 6.2.2003, J.A. Patil, J. (as His Lordship then was) directed that common evidence be led in the above suit as well as in Testamentary Petition T.P. No.48 of 1990. The order was passed on the Respondent's application. The Plaintiff and the Defendant are brothers. The above suit has been filed for probate of an alleged Will of their mother dated 9th March, 1990. The Defendant has filed T.P. No.48 of 1990 for probate of an alleged Will dated 24th May, 1989.

4. The orders sought by way of prayers (a) to (c) in the present Notice of Motion in effect seek to set aside the order dated 6.2.2003 which, as noted above, was passed on the Defendant's application. I see no reason to modify or set-aside the order. Mr.Merchant, the learned Senior Counsel appearing on behalf of the Defendant in support of this Notice of Motion contended that it would unnecessarily prolonging the litigation. Firstly, that was a point

which was available even when the order dated 6.2.2003 was passed. Secondly, the submission is not well founded. The mere fact that if the Plaintiff in the above suit succeeds, T.P. 48 of 1990 filed by the Defendant would not have to be proceeded with, would make little difference. The prior alleged Will dated 24.5.1989 has been challenged by the Plaintiff on various grounds. Thus in any event T.P. 48 of 1990 would also have to be heard.

5. Lastly in view of the fact that common evidence is ordered to be recorded, it matters little whether the Plaintiff or the Defendant leads evidence first. In that view of the matter, in the normal course, the Plaintiff in the first suit ought to lead evidence first. Further the Defendant has already examined one of her witnesses albeit for the reason that the witness who resides abroad was at the relevant time in Bombay.

6. It is clarified that the Defendant will first examine all her witnesses in the first instance subject to her right to leading evidence in rebuttal. Thereafter the Plaintiff shall lead his evidence.

7. In the circumstances, the Chamber Summons is

dismissed. However as noted above, the evidence of all the witnesses of both the parties shall be recorded by the learned Commissioner Mr.G.G. Desai.